Supreme Court, U.S.
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No. 98-1941

In The

Supreme Court of the United States

CINDY L. MCNAUGHTON,

Petitioner,

vs.

UNITED HEALTHCARE SERVICES, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Court grant certiorari to determine the scope of § 1's exclusion of certain individual employment contracts from the Federal Arbitration Act, or whether there has been any deprivation of federal constitutional rights, when Petitioner never presented these issues to the Circuit Court of Jefferson County, Alabama or the Alabama Supreme Court?

II. Should this Court grant certiorari to determine the scope of § 1's exclusion of certain individual employment contracts from the Federal Arbitration Act, in the absence of conflict among the United States Courts of Appeals?

III. Should this Court grant certiorari to determine whether the Alabama Supreme Court correctly determined the validity of a contract under Alabama law?

IV. Does the specific arbitration agreement at issue violate Petitioner's rights to equal protection, due process and trial by jury?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petition accurately lists the parties to the proceeding.

United HealthCare Corporation is the parent company of United HealthCare Services, Inc. United HealthCare Services, Inc. has two nonwholly owned subsidiaries: (1) United HealthCare of Virginia, Inc. and (2) United HealthCare of Kentucky, Ltd.

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BRIEF IN OPPOSITION

Respondents United HealthCare Services, Inc. ("United HealthCare") and Tony Derico ("Derico") (collectively "United"), respectfully request that this Court deny Cindy L. McNaughton's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On April 7, 1997, Petitioner sued United HealthCare, her former employer, and Derico, her former supervisor at United HealthCare, in the Circuit Court of Jefferson County, Alabama (the "Circuit Court"), alleging fraud and intentional interference with business relations. On April 22, 1997, United moved the Circuit Court to stay the action pursuant to § 3 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 3. Petitioner filed a Memorandum opposing United's motion on May 22, 1997. The Memorandum requested the Circuit Court not to stay the action because (1) "the arbitration clause is not part of a contract," App. 11, and (2) "the arbitration clause is not mutually binding," App. 14. In her Memorandum, Petitioner neither raised any issue regarding the scope of § 1's exclusion of individual employment contracts from the FAA, nor did she raise any issue regarding any alleged violation of her constitutional rights to a jury trial or due process. App. 8-17.

On June 13, 1997, the Circuit Court granted United's motion to stay. Pet. App. 35. On July 15, 1997, McNaughton petitioned the Alabama Supreme Court for a Writ of Mandamus. In her Petition for Writ of Mandamus and Reply Brief in Support of Petition for Writ of

Mandamus, like her Circuit Court Memorandum, she challenged the Circuit Court's Order only on two specific state law grounds: (1) "the arbitration clause is not part of a contract," App. 1 & 32, and (2) "the arbitration clause is not mutually binding," App. 4 & 35. In her Petition for Writ of Mandamus and Reply Brief in Support of Petition for Writ of Mandamus, as in her Circuit Court Memorandum, Petitioner neither raised any issue regarding the scope of § 1's exclusion of individual employment contracts from the FAA, nor raised any issue regarding any alleged violation of her constitutional rights to a jury trial or due process. App. 1-6 & 27-41.

On August 28, 1998, in *Ex parte McNaughton*, 728 So. 2d 592 (Ala. 1998), the Alabama Supreme Court denied McNaughton's Petition for Writ of Mandamus. Pet. App. 16. It held that the arbitration agreement was a valid contract under Alabama state law, and that the arbitration agreement was not void under the state law doctrine of unconscionability/mutuality of remedy. Moreover, the Alabama Supreme Court expressly noted that Petitioner never raised the issue of the scope of § 1's exclusion of individual employment contracts. Pet. App. 4 n.3. It denied Petitioner's application for rehearing, without opinion, on March 5, 1999. Pet. App. 34. To date, Petitioner has not sought to arbitrate any of her claims.

STATEMENT OF FACTS

On July 29, 1996, United HealthCare hired Petitioner as an Account Service Coordinator in its Montgomery, Alabama office. United HealthCare transferred Petitioner to the position of Account Service Representative on

October 14, 1996. On April 11, 1997, Petitioner voluntarily resigned.

Petitioner's Complaint alleges that United HealthCare and Derico defrauded her when Derico allegedly promised her that she could transfer to United HealthCare's Birmingham, Alabama office. She claims she detrimentally relied on that alleged promise when she moved from Montgomery to Birmingham. Derico made the alleged promise in the line and scope of his employment with United HealthCare. Her Complaint also alleges that Derico's actions constitute intentional interference with business relations.

Respondents have denied Petitioner's allegations. Respondents contend that no one at United HealthCare promised Petitioner a job in Birmingham. Respondents further contend that, rather than relying on any alleged promise of Derico's, Petitioner moved to Birmingham so she could live with her boyfriend, a Birmingham resident.

When United HealthCare hired Petitioner, she was given a copy of its Employee Handbook (the "Handbook"). The Handbook contains an Internal Dispute Resolution Policy ("IDR") and an Arbitration Policy. The Handbook also contains an acknowledgment form (the "Acknowledgment") stating that the employee has received and reviewed the policies contained in the Handbook and that the employee agrees to arbitrate all employment-related disputes. Pet. App. 6. United HealthCare's IDR and arbitration policies are company wide: United HealthCare requires all of its employees, from the chief executive officer to entry level customer service

representatives, to sign the Arbitration Agreement as a condition of their employment. Pet. App. 2.

The Handbook not only thoroughly discusses United HealthCare's arbitration policy, the Acknowledgment also specifically refers to it twice. The Acknowledgment states that the employee agrees to arbitration as the final and exclusive forum for the resolution of all employment related disputes:

> **Internal Dispute Resolution/Employment Arbitration Policy** (section A5). . . . I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under UHC's policy.

Pet. App. 5-6. The Acknowledgment also confirms that the employee understands that, except for the arbitration policy, the Handbook is not an employment contract:

> [T]he provisions in this Handbook are guidelines and, *except for the provisions of the Employment Arbitration Policy*, do not establish a contract or any particular terms or condition of employment between myself and UHC.

Pet. App. 8 (emphasis added). McNaughton signed the Acknowledgment and thereby agreed to arbitrate all of her employment related claims. Pet. App. 2.

REASONS FOR DENYING THE WRIT

I. BECAUSE PETITIONER FAILED TO RAISE BELOW ANY ISSUE REGARDING § 1'S EXCLUSION OF HER INDIVIDUAL EMPLOYMENT CONTRACT FROM THE FEDERAL ARBITRATION ACT OR THE ALLEGED DEPRIVATION OF HER CONSTITUTIONAL RIGHTS TO TRIAL BY JURY AND DUE PROCESS, SHE MAY NOT RAISE THEM FOR THE FIRST TIME NOW

Petitioner requests that this Court grant certiorari to review whether § 1 of the FAA excludes her individual employment contract from the FAA's coverage, and whether there has been some deprivation of her constitutional rights to trial by jury and due process. However, because she never raised these issues below,[1] Petitioner must demonstrate that these issues are "very rare exceptions" to the rule that forecloses this Court's certiorari review of issues never raised below.

A. This Court Grants Certiorari to Review Issues Not Raised in a State Court Only in "Very Rare Exceptions"

This Court has been extremely reluctant to exercise its certiorari jurisdiction to review state court judgments

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[1] In her Reply Brief in Support of Petition for Writ of Mandamus Petitioner makes passing reference to a denial of "her access to a right to trial by a jury on the basis that she signed an acknowledgment of an Employee Handbook." App. 1. However, Petitioner only argued that the writing effectuating her waiver of that right was insufficient under Alabama contract law – not that the arbitration agreement itself amounted to a deprivation of her constitutional rights.

under 28 U.S.C. § 1257 when the issue was not raised below. Most recently, this Court held that it exercises certiorari jurisdiction only in "very rare cases" when the issue was not addressed or presented below:

> With *"very rare exceptions," Yee v. Escondido*, 503 U.S. 519, 533 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a Petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86 (1997) (emphasis added). *See, e.g., Yee v. Escondido*, 503 U.S. 519, 533 (1992) (denying petition for writ of certiorari because, although the issue had been raised before the state supreme court, petitioners neither raised the issue in their complaint nor before the California Court of Appeals); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (dismissing writ because this Court learned for the first time during oral argument that issue had not been raised below); *Webb v. Webb*, 451 U.S. 493, 501 (1981) (dismissing petition after learning that issue was not raised below); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) (holding that petitioner must raise issue below "with fair precision and in due time"). This Court's reluctance to review issues on appeal that were not raised in the state courts below dates back to its beginnings. In the very early case of *Crowell v. Randall*, 35 U.S. 368 (1836), Justice Story, writing for the majority, indicated that this Court's appellate jurisdiction fails unless a federal question has been both raised and decided in a state court below. *See Crowell*, 35 U.S. at 375-76. Accordingly, this Court has been extremely reluctant to grant certiorari when reviewing issues that were not raised below.

B. There Are "Powerful Policy Considerations" for this Court's "Very Rare Exceptions" Doctrine

As this Court has noted, there are "powerful policy considerations" for this Court's "very rare exceptions" doctrine. *Webb*, 451 U.S. at 499. First, if the issue is not raised below, there will likely be an inadequate record for appellate review, *see Cardinale*, 394 U.S. at 439, because the parties did not have the "opportunity to develop the record necessary for adjudicating the issue," *Webb*, 451 U.S. at 500. Second, if state courts do not address the issue first, they will not have an opportunity to rely on independent and adequate state grounds to avoid a constitutional issue. *See id.* Third, when the parties present the issue to the state court, the state court's opinion on the issue spares this Court additional unnecessary work. *See id.* at 501 ("In terms of our own workload, this is a *very substantial matter.*") (emphasis added). Fourth, allowing state courts to address the issue first also helps ensure the proper federal-state comity. *See id* at 500. Thus, this Court should only grant certiorari in "very rare exceptions" where issues have not been raised below, and this case certainly does not present facts or circumstances justifying an exception.

C. This Court Should Not Grant Certiorari Because Petitioner Failed to Raise the FAA § 1 and Constitutional Issues Below

Because Petitioner failed to raise the FAA § 1 issue and constitutional issues below, this Court should not grant certiorari to consider them now. First, Petitioner

cannot dispute that she failed to raise the § 1 issue below. The Alabama Supreme Court specifically noted that the FAA's applicability to Petitioner's individual employment contract was a *"matter [that was] not raised by McNaughton."*[2] Pet. App. 4. (emphasis added). Both at the trial and appellate level, Petitioner never expressly or even implicitly questioned the FAA's applicability to her individual employment contract. App. 1-6, 8-17, & 27-41. United therefore has not had the opportunity to brief this issue or develop an adequate record for appellate review. Consequently, because Petitioner has failed to plead the particular claim at issue with "fair precision and in due time," this Court should not grant certiorari. *Zimmerman*, 278 U.S. at 67. This case is not one of the "very rare" cases for which this Court should make an exception to its rule because, as discussed below, the United States Courts of Appeals are *unanimous* on the FAA's applicability to individual employment contracts for non-transportation employees.

Second, Petitioner now seeks to argue for the first time the alleged violation of her Fifth, Seventh, and Fourteenth Amendment rights. App. 1-6, 8-17, & 27-41. However, the Alabama Supreme Court majority opinion is silent on these constitutional issues. Pet. App. 1-16. And,

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[2] Although the Alabama Supreme Court also noted in the same footnote that it believes § 1's exclusion of certain types of individual employment contracts do not apply to her employment contract with United HealthCare, it did so only in dictum. Therefore, Petitioner has failed to present this issue in a manner sufficient to satisfy this Court's jurisdictional and prudential requirements that state courts have the opportunity to "address" federal questions. *See Adams*, 520 U.S at 86.

"when the highest state court is silent on a federal question before us, [this Court] assume[s] that the issue was not properly presented." *Board of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). Thus, Petitioner bears the heavy burden of defeating this assumption by demonstrating that the state court had a "fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Petitioner cannot meet that burden based on the record below.

D. This Court Should Not Grant Certiorari Because Petitioner Failed to Comply with Rule 14.1(g)(i)

This Court also should not grant certiorari because Petitioner failed to follow Rule 14.1(g)(i) of this Court, which requires petitioners to specify when the issue was raised below. This Court adopted this rule so the parties could assist it when determining whether issues have been properly raised below. As this Court has explained, because it disfavors the filing of the record below before it grants certiorari, it is "largely dependent" on the parties when it determines whether the issue has been properly raised below. *See Webb*, 451 U.S. at 501. If a party fails to specify when the issue was raised below, that party's failure puts an extra burden on this Court. Thus, when a party fails to follow Rule 14.1(g)(i), this Court should not grant certiorari. *See* S. Ct. Rule 14.4 (giving this Court the ability to dismiss petitions that fail to present "with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration").

In this case, there is no indication whatsoever from Petitioner that she raised the § 1 and constitutional issues below or that any Alabama state court has had the opportunity to address them. Because Petitioner failed to raise these issues before the Alabama state courts, she did not – and could not – comply with Rule 14.1(g)(i). Instead, in an apparent effort to prove that this particular question was put before the lower court, Petitioner quotes a dissenting opinion of an Alabama Supreme Court Justice, which summarily laments some imagined future loss of constitutional rights for employees who are required to arbitrate employment contracts under the FAA. Pet. 19. However, this citation establishes nothing more than the dissent's *sua sponte* speculation. It does not provide any reasonable basis from which this Court may infer that the issue was raised below. Moreover, not only did she fail to follow the letter of the rule, she also failed to follow the spirit of the rule. To fulfill her obligation to this Court, she should have at least pointed out her failure to raise the issue below and explained why, notwithstanding her failure, this Court should grant certiorari. Thus, for these reasons alone, this Court should deny her deficient petition.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE FEDERAL ARBITRATION ACT APPLIES TO PETITIONER'S INDIVIDUAL EMPLOYMENT CONTRACT BECAUSE THERE IS NOT A CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS

Petitioner requests that this Court grant certiorari because there is a conflict among the United States Courts of Appeals regarding whether § 1 of the FAA would exclude her individual employment contract from the FAA's coverage. Pet. 10. This Court has long recognized that any conflict among the circuits must be a real conflict. *See, e.g., Sanchez v. Borras,* 283 U.S. 798-99 (1931) (After closely analyzing the facts of the cases allegedly in conflict, this Court dismissed a certiorari petition it had previously granted); *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 389 (1923) (dismissing certiorari because there was no "real and embarrassing conflict of opinion between the circuit courts of appeals"). Additionally, this Court has noted that dicta cannot create a conflict. *Wisconsin Elec. Co. v. Dumore Co.,* 282 U.S. 813, 813 (1931) ("It appearing that the asserted conflict in decisions arises from *differences in states of fact,* and *not in the application of a principle of law,* the writ of certiorari is dismissed as improvidently granted.") (emphasis added). Thus, if the only conflict among the circuits is illusory, or based on dicta, this Court should not grant certiorari.

Every United States Court of Appeals that has considered the scope of § 1's exclusion of individual employment contracts from the FAA has construed it narrowly, and stated that it applies only to transportation workers.

See, e.g., Brennan v. King, 139 F.3d 258, 264 n.5 (1st Cir. 1998); *Oldroyd v. Emira Sav. Bank, FSB*, 134 F.3d 72, 78 n.2 (2d Cir. 1998); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 218 (5th Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 599-601 (6th Cir. 1995); *Koveleskie v. SBC Capital Markets*, 167 F.3d 361, 363-64 (7th Cir. 1999); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 836 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 574-76 (10th Cir. 1998); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (Cox, J., concurring); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997).

Although Petitioner requests that this Court resolve the "conflict" among the "United States courts of appeals and highest courts of the fifty states" regarding the scope of the exclusion of individual employment contracts from the FAA, she cites only one easily distinguishable decision, *Craft v. Campbell Soup Company*, 161 F.3d 1199 (9th Cir. 1998),[3] as creating a conflict among the circuits.[4] The Ninth Circuit in *Craft* merely holds that § 1 excludes all collective bargaining agreements from the FAA. In *Craft*, Anthony Craft worked for the Campbell Soup Company

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[3] Only days after Petitioner submitted her Petition for Writ of Certiorari, the Ninth Circuit amended its decision in *Craft v. Campbell Soup Co.*, 1999 WL 333189 (9th Cir. 1999). As discussed below, the amended Ninth Circuit decision emphasizes that the arbitration clause was in a collective bargaining agreement.

[4] Since Petitioner has not cited any cases from the "highest courts of the fifty states," United will only respond to the alleged conflict among the circuits.

("Campbell Soup") and was a member of the Food Process Workers and Warehousemen and Helpers Local Union (the "Union"). 1999 WL at *1. The Union had a collective bargaining agreement ("CBA") with Campbell Soup that contained a mandatory grievance/arbitration clause for discrimination claims. *See id.* Because, among other things, he believed that Campbell Soup discriminated against him based on his race, Craft filed a grievance pursuant to the CBA. Before the arbitrator resolved the grievance, Craft filed a complaint in district court alleging Title VII violations and state law claims. The district court compelled him to arbitrate his claims. *See id.*

In its amended decision to reverse the district court, the Ninth Circuit focused its reasoning in large part on the CBA. It reasoned that the Ninth Circuit and the Supreme Court had each expressed reluctance about applying the FAA to CBA's:

> We have repeatedly noted the Supreme Court's reluctance to hold the FAA applicable to labor disputes. *See Local 1020 of the United Brotherhood of Carpenters & Joiners of Am. v. FMC Corp.*, 658 F.2d 1285, 1290 (9th Cir. 1981) ("We note the reluctance of the Supreme Court to hold that the applicable arbitration proceedings involving labor disputes . . . .") *See also American Postal Workers Union of Los Angeles, AFL-CIO v. United States Postal Serv.*, 861 F.2d 211, 315 n.2 (9th Cir. 1988) ("Neither the Supreme Court nor this Court has ever held that the Federal Arbitration Act is applicable to arbitration of labor disputes.")

> We have also stated our own inclination not to apply the FAA to those disputes. *See Pacific Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1024 n.2 (9th Cir. 1991) (citing *Misco*, 484 U.S. at 40) (noting in dictum, that "labor arbitration . . . is not covered by the FAA"); *American Postal Workers*, 861 F.2d 215 (indicating that Congress did not mean the FAA to be used to review arbitration awards involving collective bargaining agreements); *Kemner v. District Council of Painting and Allied Trades No. 36*, 768 F.2d 1115, 1118 n.1 (9th Cir. 1985) (stating a similar principle); *San Diego County Dist. Council of Carpenters v. Cory*, 685 F.2d 1137, 1141 (9th Cir. 1982) (stating a similar principle); *FMC Corp.*, 658 F.2d at 1290 (citing with approval Justice Frankfurter's dissent in Lincoln Mills).

1999 WL 333189, *6. In its amended decision, the Court also quoted Justice Frankfurter's dissent in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), in which he urged the Court to hold explicitly – and not just implicitly – that the FAA does not apply to labor arbitrations:

> Naturally enough, I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for "contracts of employment," were available, the Court would hardly spin such powder out of the empty darkness of § 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the

> federal courts, it saw fit to exclude this remedy with respect to labor contracts.

1999 WL 333189, *7. Furthermore, the legislative history that the court discusses in its amended decision supports its holding that the FAA is inapplicable to a *CBA*, but is silent on the issue of the FAA's applicability to an *individual employment contract*. *Id.* at *6 ("It is not intended that this shall be an act referring to *labor disputes* at all.") (emphasis added). Because the Ninth Circuit added all of the language discussed in this paragraph to its amended decision, it clearly sought to underscore the significance of the CBA. Thus, it is inescapable that the Ninth Circuit focused its reasoning on the placement of the arbitration clause in the CBA. Therefore, the Ninth Circuit is not in conflict with the other United States Courts of Appeals because its statements about individual employment contracts are only dicta.

It is understandable that the Ninth Circuit focused its reasoning on the FAA's application to collective bargaining agreements and not on its application to individual employment contracts. As many lower courts and even this Court have recognized, while the FAA does not apply to collective bargaining agreements, it applies to individual employment contracts.[5] For instance, the Fifth

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[5] It is hardly surprising that courts have treated collective bargaining agreements differently from individual employment agreement because it was, after all, a union lobbyist who insisted upon the insertion of § 1. *See, e.g., American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 823 F.2d 466, 470-71 (11th Cir. 1987); *Signal-Stat Corp. v. Local 475, United Electric*, 235 F.2d 298, 302 (2d Cir. 1956); *Tenney Eng'g v. United Electrical Radio & Machine Workers of Am.*, 207 F.2d 450, 452 (3d

Circuit, in *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997), distinguished its early precedent holding that the FAA applied to collective bargaining agreements. In that case, Public Store Management, Inc. ("Public Store") gave its employee, Janice Sue Miller, an employment contract to sign during a performance review. The employment contract contained a mandatory arbitration clause. After signing the contract, she injured her arm and took a medical leave of absence. When her employer fired her, she filed an EEOC charge and, subsequently, sued Public Store alleging ADA discrimination and state law retaliation. 121 F.3d at 217. After the district court granted Public Store's motion to compel arbitration, Miller appealed to the Fifth Circuit. The Fifth Circuit affirmed the district court even though in *Lincoln Mills v. Textile Workers Union*, 230 F.2d 81 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957), it had held that § 1 excludes all CBAs from the FAA. It distinguished *Lincoln Mills* because it only exempted "disputes arising under collective bargaining agreements" from the FAA. 121 F.3d at 218. Thus, the Fifth Circuit reasoned that its earlier CBA precedent did not apply to an individual employment contract case.

The Fifth Circuit is certainly not alone. Many other courts have distinguished between the FAA's inapplicability to collective bargaining agreements and its applicability to individual employment contracts. *See, e.g., O'Neil*, 115 F.3d at 274 n.1 (distinguishing its earlier holding collective bargaining precedent because it

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Cir. 1953); *Scott v. Farm Life Ins. Co.*, 827 F. Supp. 76, 78 (D. Mass. 1993).

"clearly does not apply to an *individual employment contract*") (emphasis added); *Miller*, 121 F.3d at 218 (distinguishing collective bargaining agreements from individual employment contracts); *Hull v. NCR Corp.*, 826 F. Supp. 303, 306-07 (E.D. Miss. 1993) ("FAA is applicable to *nonunion* employment contracts involving workers who are not involved in the transportation industry.") (emphasis added) (citation omitted); *Management Recruiters Int'l v. Nebel*, 765 F. Supp. 419, 421 (N.D. Ohio 1991) ("[E]mployment agreements involving *nonunion* workers, who are not involved in the transportation industry, are in fact covered by the FAA); *United Electric, Radio & Mechanical Workers v. Miller Products*, 215 F.2d 221 (4th Cir. 1954) (expressly limiting its § 1 holding to collective bargaining agreements).

This Court has suggested that, while the FAA does not apply to arbitration clauses in CBAs, the FAA applies to individual employment contracts. In *United Paperworkers v. Misco*, 484 U.S. 29 (1987), this Court went out of its way to explain in a footnote that, even though the FAA does not apply to arbitration clauses in CBAs, courts should look to the FAA for guidance:

> The *Arbitration Act does not apply to* "contracts of employment of . . . workers engaged in interstate commerce," 9 U.S.C. § 1 [9 USCS § 1], but the federal courts have often looked to the Act for guidance in *labor arbitration cases* . . . .

484 U.S. at 40 (emphasis added). Thus, this Court implicitly recognized that the FAA does not apply to CBAs.

On the other hand, this Court indicated in *Gilmer v. Interstate/Johnson Land*, 500 U.S. 200 (1991), that the FAA applies to some individual employment contracts. As the

District of Columbia Circuit has observed, "the result reached in *Gilmer* implicitly suggests that the FAA does not exclude all [individual] contracts of employment." 105 F.3d at 1472. To support its conclusion about this Court's implicit holding, it paraphrased part of Justice Stevens' dissent:

> [I]f the FAA actually excluded all employment contracts from the enforcement provisions of the FAA, it would be anomalous to compel arbitration of Gilmer's employment claims simply because the arbitration agreement was not formally part of a "contract of employment."

Id. (citing *Gilmer*, 500 U.S. at 40 (Stevens, J., dissenting)). Thus, a CBA case like *Craft* is easily distinguishable from an individual employment contract case like *McNaughton*. Therefore, since the United States Courts of Appeals and the Alabama Supreme Court are unanimous on the FAA's applicability to *individual employment contracts*, this Court should not waste its precious time reviewing this issue.

III. THE ALABAMA SUPREME COURT CORRECTLY DETERMINED THAT THE ARBITRATION AGREEMENT PETITIONER SIGNED IS A VALID, BINDING CONTRACT UNDER ALABAMA LAW

Petitioner argues that because the arbitration provision did not arise out of a "contract," the FAA does not apply to it. Although Petitioner correctly observes that the FAA only applies to certain types of "contracts," she misses the mark when she argues that this Court should second guess the Alabama Supreme Court's holding that the arbitration provision arose out of an enforceable contract pursuant to state law.

A. This Court Should not Grant Certiorari to Review Whether the Alabama Supreme Court Properly Applied Alabama Law

Petitioner requests that this Court review whether the Alabama Supreme Court correctly applied Alabama law in determining that the arbitration agreement Petitioner signed is a valid, binding contract. This issue does not implicate any of the grounds this Court has articulated in Supreme Court Rule 10 as warranting certiorari review because it does not implicate any federal issue.

The issue of what constitutes a binding contract under Alabama law is an issue for the Alabama Supreme Court. Who is better to determine what Alabama contract law is than the Alabama Supreme Court? Indeed, federal courts have the authority to, and often do, certify such state law issues to the highest courts of the states. Petitioner is asking this Court to waste its precious time to determine what Alabama contract law is even though the Alabama Supreme Court, the ultimate authority on the issue, has already decided the issue.

B. The Alabama Supreme Court Correctly Held that the Arbitration Agreement Is a Binding Contract under Alabama law

Even if this Court were to decide that it may review whether the Alabama Supreme Court correctly applied Alabama contract law, this Court should not grant certiorari because the Alabama Supreme Court correctly applied Alabama law. Petitioner argues that the arbitration agreement she signed is unenforceable because it was not accompanied by an employment contract. In

other words, Petitioner claims that her status as an at-will employee prevents her from being bound by an agreement to arbitrate all employment disputes with United. Petitioner's argument represents a fundamental misunderstanding of the arbitration agreement and its relation to her status as an at-will employee. The arbitration agreement is a contract under Alabama law, as the Alabama Supreme Court correctly concluded.

The arbitration agreement is incorporated into the Employee Handbook provided to McNaughton at the time of her hire. Upon receipt of the handbook, Petitioner executed a document titled "Code of Conduct and Employee Handbook Acknowledgment." Her Petition quotes a portion of the Acknowledgment, but omits a critical phrase of the UHC Employee Handbook through the use of an ellipses[6]:

McNaughton's Edited Version	**The Unedited Acknowledgment**
The provisions in this handbook are guidelines and . . . do not establish a contract or any particular terms or conditions of employment between myself and UHC. Pet. 15 (emphasis added).	The provisions in this handbook are guidelines and, except for the provisions of the Employee Arbitration Policy, do not establish a contract or any particular terms or conditions of employment between myself and UHC. Pet. App. 5 (emphasis supplied).

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[6] Although Petitioner includes the critical provision (*i.e.*, "except for the provisions of the Employee Arbitration Policy") in her quotation of the Acknowledgment in her Statement of Facts, she emphasizes the "do not establish a contract" language.

The Acknowledgment further provides in pertinent part as follows:

> I acknowledge that I have received a copy of the United HealthCare (UHC) Code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.
>
> * * *
>
> **INTERNAL DISPUTE RESOLUTION/ EMPLOYMENT ARBITRATION POLICY** . . . These policies provide the opportunity for prompt and objective review of employment concerns. *I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under UHC's policy.*

App. 18; Pet. App. 5-6 (emphasis added).

Although Petitioner, like every other United employee, agreed to arbitrate all future employment-related disputes she might have with United in exchange for an offer of employment as an at-will employee, she argues that United's employment offer was insufficient consideration. According to Petitioner, an arbitration agreement can only be enforced if it is supported by something more than an offer of at-will employment – *i.e.*, an employment contract for a definite term. In its discussion of Alabama contract law, the Alabama Supreme Court squarely rejected Petitioner's argument based on Alabama law:

> [U]nder clear Alabama contract law, United's providing at-will employment to McNaughton constituted sufficient consideration in exchange for McNaughton's agreement to arbitrate her employment disputes under United's arbitration policy. This Court has consistently held that an employer's providing continued at-will employment is sufficient consideration to make an employee's promise to his employer binding. For example, in *Condelles v. Alabama Telecasters, Inc.*, 530 So. 2d 201, 204 (Ala. 1988), this Court stated that "continued [at-will] employment is sufficient consideration for signing a non-competition agreement." (Citing *Daughtry v. Capital Gas Co.*, 285 Ala. 89, 93, 229 So. 2d 480, 483 (1969).) Similarly, United's provision of new at-will employment to McNaughton was sufficient consideration to make McNaughton's promise to arbitrate employment disputes under United's arbitration policy a binding agreement.
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> These conclusions are supported by *Kelly v. UHC Management Co.*, 967 F. Supp. 1240 (N.D. Ala. 1997), in which the United States District Court for the Northern District of Alabama held that an acknowledgment form signed upon receipt of an employee handbook and that contained language identical to the language of the acknowledgment form signed by McNaughton created a binding contract to arbitrate employment disputes . . . . The district court in *Kelly* held that the acknowledgment form signed by the employees created a binding agreement to arbitrate their claims against the employer. *Id.* at 1260. Accord *Beasley*, ___ So. 2d at ___ (stating that if an employee signs an acknowledgment form containing a binding arbitration clause, the

> employee will be required to arbitrate his claims) (citing *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 273 (4th Cir. 1997), and *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997)). Accordingly, we hold that the acknowledgment form signed by McNaughton created a binding agreement to arbitrate her claims against United.

Pet. App. 9.

Moreover, the Alabama Supreme Court correctly determined that under clear Alabama precedent, the Acknowledgment's arbitration provision constituted a contract. It noted that, if it held otherwise, it would impermissibly create different standards for arbitration clauses than other contract clauses under Alabama law, which is contrary to this Court's holding in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996):

> McNaughton's signed acknowledgment form indicates that the parties agreed to be bound by one provision of the employee handbook – the arbitration policy – but not by other provisions of the handbook. Under [*Crown Pontiac, Inc. v.*] *McCarrell*, 695 So. 2d [615] at 618-20 [(Ala. 1997)], the provision of the employee handbook to which McNaughton agreed to be bound – "I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy" – is binding.[4] And the other provisions of the employee handbook to which McNaughton did not agree to bound – "I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employee Arbitration Policy, do not establish a contract" – are not binding. *Id.*

> *Given the clear precedent of McCarrell, to hold otherwise would treat arbitration clauses differently from other provisions of a contract, in contravention of the express holding of the Supreme Court of the United States.* See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state law applicable only to arbitration provisions. . . . By enacting § 2 [of the Federal Arbitration Act] . . . , Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.' ") (citations omitted).
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> [4] Ordinarily, in order to constitute a contract, an employee handbook must evidence a clear intention to bind the employer and the employee. *Cf. Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987). In this case, the strikingly clear language of the acknowledgment form signed by McNaughton – "I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy" – evidences such an intent.

Pet. App. 6-7 (emphasis added).

Petitioner apparently relies upon *Chastain v. Robinson Humphrey*, 957 F.2d 851 (11th Cir. 1992), for the proposition that the Circuit Court improperly stayed this action. Petitioner's reliance upon that case is entirely misplaced. Even the Eleventh Circuit recognized the narrowness of its holding by noting the "unusual facts" of the case. 957 F.2d 851, 852. In that case, it was undisputed that the

plaintiff had not signed the brokerage agreement containing the arbitration clause. The sole issue presented to the Eleventh Circuit was whether the arbitrator or the district court should decide whether the plaintiff had agreed to arbitrate, *see id.* at 856, because "parties cannot be forced to submit to arbitration *if they have not agreed to do so*," *id.* at 854 (emphasis added). The Eleventh Circuit concluded that the district court should determine whether the plaintiff was bound by the arbitration language in the customer agreement because it was unclear whether the plaintiff had agreed to arbitrate. Here, it is undisputed that Petitioner *agreed to arbitrate*. Specifically, she signed the Acknowledgment in which she agreed to "submit all employment related disputes to arbitration." App. 6. Thus, the Eleventh Circuit's ruling in *Chastain* is not applicable to this case. Accordingly, the Alabama Supreme Court correctly concluded that the arbitration agreement constituted a valid, binding contract under Alabama law.

IV. ENFORCEMENT OF A VALID ARBITRATION AGREEMENT DOES NOT VIOLATE ANY RIGHT TO EQUAL PROTECTION, DUE PROCESS OR TRIAL BY JURY UNDER THE ALABAMA CONSTITUTION OR THE UNITED STATES CONSTITUTION

In the third section of her Petition for Writ of Certiorari, Petitioner argues with virtually no authority, that the arbitration agreement that she signed (the "Arbitration Agreement") violates her state and federal constitutional rights.

A. This Court Should Not Grant Certiorari to Determine Whether the Arbitration Agreement Petitioner Signed Violates Her Alabama Constitutional Rights

This Court should not grant certiorari to determine whether the Arbitration Agreement violates Petitioner's Alabama constitutional rights because this Court does not have jurisdiction under 28 U.S.C. § 1257, and because Petitioner has failed to specify the provision of the Alabama constitution it violates. First, this Court does not have jurisdiction to review the alleged violation of Petitioner's Alabama constitutional rights. Its sole statutory basis for reviewing state court judgments is 28 U.S.C. § 1257. Under that statute, to review a state statute or, by logical implication constitution, this Court must find that it is "repugnant to the Constitution, treaties, or laws of the United States . . . ." 28 U.S.C. § 1257(a). In this case, Petitioner alleges that the Arbitration Agreement violated her Alabama constitutional rights although she never argues that the Alabama constitution is "repugnant to the Constitution, treaties, or laws of the United States." Therefore, this Court does not have jurisdiction to grant certiorari on this issue. Second, Petitioner has failed to specify the provision of the Alabama constitution that the arbitration agreement allegedly violates. Therefore, for this Court to review this issue, it would have to search through the entire Alabama constitution to determine if any provision is applicable. Thus, this Court should not grant certiorari to review the alleged violation of Petitioner's Alabama constitutional rights.

B. This Court Should Not Grant Certiorari to Determine Whether the Arbitration Agreement that Petitioner Signed Violates Her Federal Constitutional Rights

This Court should not grant certiorari to determine whether the arbitration agreement that Petitioner signed violates her federal Constitutional rights. Petitioner alleges that the Arbitration Agreement violates her Fourteenth Amendment right to equal protection, Fifth Amendment right to due process, and Seventh Amendment right to a jury trial. Her Fourteenth Amendment and Fifth Amendment arguments fail because there is no state action and because arbitration protects parties' substantive and procedural rights. Her Seventh Amendment argument fails because parties do not have the right to a jury trial outside of an Article III forum.

1. Fourteenth Amendment Right to Equal Protection and Fifth Amendment Right to Due Process

This Court should not grant certiorari to determine whether the arbitration agreement that Petitioner signed violates her Fourteenth Amendment right to equal protection or her Fifth Amendment right to due process. First, to state an equal protection or due process claim, the petitioner must point to state action. *See, e.g.*, 167 F.3d at 368 ("[W]ithout *state action*, there can be no violation."); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171 (1972) (Fourteenth Amendment); United States Const. amend. XIV § 1 (" . . . nor shall *any State* . . . deny to any person the *equal protection* of the laws.") (emphasis added). In this case, Petitioner has failed to identify any

state action. Therefore, as a matter of well established constitutional law, Petitioner's equal protection and due process arguments fail.

Second, although Petitioner failed to articulate the basis for the alleged equal protection and due process violation, in *Koveleskie*, the Seventh Circuit recognized that equal protection and due process challenges to compulsory arbitration rest upon the mistaken assumption that a non-Article III forum cannot protect the party's right. *See* 167 F.3d at 368. The Seventh Circuit rejected this misguided notion because this Court in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), held that arbitration adequately protects a party's substantive and procedural rights. *See id.* at 369; *see also Gilmer*, 500 U.S. at 30-33 (rejecting arguments that arbitration does not protect a party's rights). Thus, because these challenges rest upon a mistaken assumption, and a disregard for *Gilmer*, this Court should not grant certiorari.

Petitioner cites *Heurtebise v. Reliable Business Computers*, 550 N.W.2d 243 (Mich. 1996), to support her inequality of bargaining power argument: employees do not always have the option of walking away from employment offers conditioned on the employee's agreement because jobs are not always "readily available." 550 N.W. 2d at 255. Appellant's argument misses the mark for two reasons. First, her brief fails to explain that this language is not taken from the majority opinion.[7] Second,

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[7] She cites section V of Justice Cavanagh's opinion. 550 N.W.2d at 258. Although Justices Levin and Mallett concurred with the entire opinion, Justice Boyle wrote separately concurring only with sections I, II, and VII. *Id.* Since Justices Brickley, Riley, and Weaver joined Justices Boyles' opinion,

this Court in *Gilmer* has squarely rejected the argument that employers cannot compel employees to arbitrate because of some inequality of bargaining power. 500 U.S. at 30. Thus, because this argument fails under this Court's own jurisprudence, this Court should not grant certiorari.

2. Seventh Amendment Right to a Jury Trial

This Court should not grant certiorari to review whether the arbitration agreement Petitioner signed violates her Seventh Amendment right to a jury trial. As the Seventh Circuit observed in *Koveleskie*, a party may waive its right to an Article III forum by agreeing to arbitrate. 167 F.3d at 368-69. Outside of an Article III forum, it does not have a right to a jury trial. *Id.* Therefore, when a party agrees to arbitrate, it effectively waives its right to a jury trial.

Appellant apparently cites *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), for the proposition that arbitration in some circumstances can violate an employee's Seventh Amendment right to a jury trial. This case, however, does not further Petitioner's argument because it does not represent this Court's current FAA jurisprudence and because it is clearly distinguishable. First, even Justice Almon's dissent in the Alabama Supreme Court implicitly acknowledges that this case does not represent this Court's modern FAA jurisprudence. Pet. App. 20-21 (*Bernhardt* had some validity

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section V is clearly not part of the majority opinion. *Id.* Her mistake is understandable given the unorthodox form of the opinion.

before this Court decided *Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). Second, this Court in *Bernhardt* was primarily concerned with whether arbitration was a procedural or substantive right under the Eerie doctrine. Thus, since Petitioner's Seventh Amendment claim – like her other constitutional claims – has no merit, this Court should not grant certiorari.

CONCLUSION

Because there are no "compelling reasons" for this Court to grant certiorari, United respectfully requests that this Court deny McNaughton's Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF ALABAMA

CINDY L. MCNAUGHTON, Plaintiff, vs. UNITED HEALTHCARE SERVICES, INC., et al., Defendants.	)	CASE NUMBER: 1961708

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Cindy L. McNaughton, plaintiff, files this, her reply to respondent's brief, and says as follows:

ARGUMENT

There Is No Enforceable Arbitration Agreement

It is undisputed that Cindy McNaughton never knowingly waived her right to resolve her claim through a judicial forum. Defendant United HealthCare, Inc., asserts that McNaughton may be denied her access to a right to trial by a jury on the basis that she signed an acknowledgement of an Employee Handbook. However, such an assertion is contrary to established Alabama law and the intent of the legislature that agreements to arbitrate may not be specifically enforced.

Contrary to the Defendant's assertions, no contract existed between McNaughton and United. Section 8-1-41(3), Ala. Code 1975, states that agreements to submit disputes to arbitration cannot be specifically enforced. *Crown Pontiac, Inc. v. Andrew McCarrell,* 1997

WL 200542 (Ala. 1997). Where the agreement "evidences a transaction . . . involving [interstate] commerce," the Federal Arbitration Act preempts this state policy and makes the agreement enforceable. *Costal Ford, Inc. v. Delmar Kidder,* 1997 WL 187098 (Ala. 1997). The FAA does not make all **arbitration clauses** in whatever writing enforceable; rather, it makes **arbitration agreements** enforceable. *Crown Pontiac,* 1997 WL 200542 at **2. (Emphasis in original). This determination of whether the parties agreed to arbitrate their disputes should be judged by the ordinary state-law principles that govern the formation of contracts. *Id.* (quoting *First Options of Chicago v. Kaplan,* 514 U.S. 938, ___, 115 S.Ct. 1920, 1924 (1995)).

Under principles of contract law, Cindy McNaughton was not accepting the terms of a contract when she signed an acknowledgement of receiving her employee handbook. Cindy McNaughton signed her name merely to acknowledge that she had received a set of documents, and the employee handbook recognized this fact by calling Cindy McNaughton's signature an "Employee Handbook Acknowledgement." Defendant's assertion that Cindy McNaughton's signature of acknowledgment be construed as a contract is absurd. Because there is no contract involving interstate commerce in this situation, the FAA exception to Alabama Code § 8-1-41(3) does not apply, and this language cannot be specifically enforced under Alabama law. McNaughton was not agreeing to arbitration, she was acknowledging the receipt of her employee handbook.

Furthermore, there is no arbitration agreement in this case by which Cindy McNaughton can be bound. The

language addressing arbitration is merely a section of the employee handbook. Under the FAA, **arbitration agreements** may be enforceable where there is a transaction involving interstate commerce, however, the FAA does not make all **arbitration clauses** enforceable. In this case the relevant language is only a clause of the much larger employee handbook. One clause cannot be considered an arbitration agreement, therefore this language is not enforceable under Alabama law.

The Ninth Circuit recently recognized in *Nelson v. Cypress Bagdad Copper Corporation*, 119 F.3d 756 (9th Cir., July 10, 1997), that an employee does not agree to be bound by the provisions of an employee handbook when she signs an acknowledgment form. In *Nelson*, the court held that the plaintiff did not waive his right to judicial forum merely by signing an acknowledgment form. *Nelson*, 119 F.3d at 761. The court noted that the acknowledgment form itself suggested that the handbook was a guideline to the company's unilaterally promulgated policies and procedures, and that merely signing the form did not in any way constitute a knowing agreement to arbitrate and thereby surrender his statutory right to a judicial forum. *Id.* The court noted that any bargain to waive the right to a judicial forum must at the least be an express agreement. *Id.* at 762. The choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question. *Id.*

Because there was no express agreement, the court in *Nelson* found that the unilateral promulgation by an employer of arbitration provisions in an employee handbook does not constitute a knowing agreement on the part of an employee to waive a statutory remedy. *Id.* The

court also found that the right to judicial forum is not waived, even though the handbook is furnished to the employee and the employee acknowledges its receipt and agrees to understand its contents, and even though the employee performs his obligations by commencing or continuing to do his assigned work and accepting a pay-check in return. *Id.*

Under the reasoning of the Ninth Circuit and established Alabama law, Cindy McNaughton did not expressly waive her right to a judicial forum when she signed a paper stating that she had received her copy of the employee guidelines. McNaughton, to waive her right to a judicial forum, must enter into a knowing agreement to waive such a right. The argument that a signature intended as an acknowledgement should be construed as a contract is unjust and unfair and should be dismissed by this court.

This Arbitration Clause is not Mutually Binding

Assuming arguendo that Cindy McNaughton's acknowledgment of receiving her employee handbook could in some way be twisted to create a contract, then the lack of mutuality in such contract is apparent on the face. As stated in *Northcom v. R.E. James,* 1997 WL 233918 ((Ala) 1997):

> " . . . Therefore, we hold that, in a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitration or not, and if the superior party has reserved to itself the choice of arbitration or litigation, a court may deny the superior party's motion to

> compel arbitration based on the doctrine of mutuality of remedy and unconscionability . . . The element of unconscionability in the context of an arbitration clause is supplied by the fact that, by agreeing to arbitrate, a party waives his right to "a remedy by due process of law," Ala. Const. 1901, § 11, and U.S. Const. Amend. VII. To allow such a wavier in an adhesion contract without a showing that it was voluntarily made might well be unconscionable."
>
> *Northcom*, 1997 WL 233918 at *5.

To bind Cindy McNaughton to the language of the arbitration clause in the present case would most certainly be unconscionable. While Defendant United HealthCare did not agree to arbitrate any and all disputes arising out of the employee agreement, and in fact, did not agree to anything at all, the Defendant seeks to have Cindy McNaughton bound by such language. To be held to the language of an arbitration agreement, Cindy McNaughton must voluntarily waive her right to a trial by jury, and this she did not do.

Defendant offers a recent case from this court, *Ex parte Isbell*, 1997 WL 531100 ((Ala.) 1997), as controlling, but defendant is in error. In *Isbell* the court noted that the [sic], along with the contract involved in *Northcom* there had been no allegations that the contract was one of adhesion. *Id.* at *3 This case is inapposite. In the present case it has been alleged that the employee handbook, if a to [sic] be construed as contract, would be definitely be one of adhesion. Therefore the *Isbell* holding has not application to this case.

CONCLUSION

This court should find that Cindy McNaughton's signature acknowledging receipt of her employee guidelines does not effectively deny her constitutional right to a trial by jury. A writ of mandamus should be issued directing the circuit court to reconsider its earlier order granting defendants' motion to stay proceedings based on the Federal Arbitration Act, on the ground that the alleged arbitration agreement is invalid and unenforceable.

PLAINTIFF RESPECTFULLY REQUESTS ORAL ARGUMENT ON THE ABOVE PETITION FOR WRIT OF MANDAMUS.

/s/ W. Lewis Garrison
W. Lewis Garrison, Jr.,
GAR008

/s/ Kathy H. Sumrall
Kathryn H. Sumrall SUM002

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CERTIFICATE OF SERVICE

Plaintiff certifies that she has served a copy of the above and foregoing by hand delivery on this the 12th day of September, 1997, addressed as follows:

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Nathan R. Norris
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/s/ W. Lewis Garrison
OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CINDY L. MCNAUGHTON, Plaintiff, vs. UNITED HEALTHCARE SERVICES, INC., a corporation; TONY DERICO; A, the person, firm, or corporation employing TONY DERICO, B, the correct identities of persons or entities responsible for the acts and omissions contained in the Complaint; and C, the correct designation of the person, firm or corporation responsible for the fraudulent suppression and/or misrepresentation to the plaintiff; the correct identities of which are unknown at the present time but will be added by amendment when duly ascertained; Defendants.	)	CIVIL ACTION NO. CV 97-02058

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STAY FURTHER PROCEEDINGS PURSUANT TO THE FEDERAL ARBITRATION ACT

Plaintiff Cindy McNaughton submits this memorandum in opposition to Defendants' motion to stay further proceedings pursuant to the Federal Arbitration Act.

Background

In July of 1996, plaintiff was hired by defendant United HealthCare in Montgomery, Alabama, as an Account Service Coordinator. The United employee handbook expressly provided that plaintiff's employment with United was "at-will". In October of 1996, plaintiff was transferred to the position of Account Service Representative. She received a substantial increase in salary. In February of 1997, plaintiff expressed a desire to transfer to United's Birmingham office. On February 22, 1997, she attended an interview with defendant Tony DeRico, Medicare Complete Supervisor for United's Birmingham office. At the close of the February 22, 1997 interview, DeRico offered plaintiff a position with the Birmingham office and asked her when she could begin work. Plaintiff stated that she had to notify the Montgomery office of her transfer. DeRico said he needed her to start as soon as possible and that he would talk to her supervisor the following Monday. In reliance on these representations, plaintiff notified United's Montgomery office that she would be transferring to Birmingham, forfeited her lease deposit in Montgomery, sold her furniture, and moved to Birmingham.

On or about March 5, 1997, in preparation for her new position, plaintiff picked up reading materials from United in Birmingham.

On or about March 17, 1997, United's Human Resources department contacted plaintiff and told her that the Birmingham position had been filled by a more qualified applicant.

At no time did any agent or representative of United inform plaintiff that she did not have the Birmingham job. At no time did any agent or representative of United, including defendant Tony DeRico, tell the plaintiff that United was interviewing other applicants for the position. At no time during her conversations with various people at United in Birmingham was plaintiff told that there was even a remote possibility that she would not get the job. Defendants were well aware that plaintiff planned to and eventually did move to Birmingham in reliance on their representations as to her transfer of employment. Defendants went so far as to provide Plaintiff information to prepare her for her new position in Birmingham. Defendants were also aware that Plaintiff did not actually have a job with United in Birmingham, and they failed to inform her of this fact.

Plaintiff has attempted to utilize United's internal dispute resolution process. United merely agreed to reimburse plaintiff her mileage for commuting from Birmingham to Montgomery and her lost lease deposit.

Plaintiff's position at United in Montgomery has been filled. As a result of this incident she has been forced to take another job with a reduced salary and fewer benefits. She has suffered extreme mental and emotional distress.

On April 7, 1997, Plaintiff filed a complaint in the Circuit Court of Jefferson County. On April 22, 1997, Defendants filed a motion to stay further proceedings pursuant to the Federal Arbitration Act. Defendants allege in their motion that the plaintiff executed a "contract", and that this "contract" established mandatory,

binding arbitration as the exclusive remedy for all employment related disputes.

Defendants' motion is due to be denied. The arbitration agreement upon which defendants base their contention that this case should be submitted to arbitration is invalid and unenforceable.

The Arbitration Clause is Not Part of a Contract

The plain language of 9 U.S.C. §3, the Federal Arbitration Act, provides for enforcement of an arbitration agreement if it is part of any maritime transaction, or part of a contract evidencing a transaction involving commerce. The Supreme Court of the United States has interpreted this to mean that there are three kinds of arbitrable agreements: 1) those involving maritime transactions; 2) those covering the submission of a dispute that exists when the arbitration agreement is executed; and 3) those that concern a written provision *in a contract* involving commerce. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 645 (1985). (Emphasis added) None of these circumstances are applicable to the case at bar.

9 U.S.C. § 3 provides for enforcement of an agreement to arbitrate if it is a written provision in any maritime transaction or a *contract* evidencing a transaction involving commerce. The employment agreement in the present case, by its own terms, was "at-will". There was no contract between Plaintiff and Defendants. Plaintiff could leave United at any time for any reason, and United could discharge Plaintiff at any time for any reason. Plaintiff could not maintain an action for breach of

contract. No contractual relationship existed between Plaintiff and Defendant United. Since there was no contract, it necessarily follows that the arbitration clause is not a written provision *in a contract*, as is mandated by 9 U.S.C. § 2, and therefore is not a valid agreement to arbitrate under the Federal Arbitration Act.

It is well established under Alabama law that generally, an employee is terminable at will. *Howard v. Wolff Broadcasting Corporation*, 611 So.2d 307 (Ala. 1992); *McCluskey v. Unicare Health Facility, Inc.*, 484 So.2d 398 (Ala. 1986); *Kitsos v. Mobile Gas Service Corp.*, 431 So.2d 1150 (Ala. 1983). In *White v. Chelsea Industries, Inc.*, 425 So.2d 1090 (Ala. 1983), the plaintiff's claim that an employee handbook rose to the level of a contract of employment failed because the court held that the handbook did not vary the general common law rule that an employee is terminable at will. The Alabama Supreme Court has recognized that a plaintiff may not allege breach of contract if she is an employee at will. *Miller v. SCI Systems, Inc.*, 479 So.2d 718 (Ala. 1985). Under Alabama law, Cindy McNaughton was an employee at will of Defendant United. By the terms of United's Employee Handbook, no contract existed between McNaughton and United.

McNaugton received a copy of Defendant United HealthCare's Code of Conduct and Employee Handbook Acknowledgment form when she was originally hired by United. This form, attached hereto as Exhibit A, provides in pertinent part:

At-Will Employment

> I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.
>
> I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline.

There is no question that the employment arrangement between Plaintiff and Defendants was "at-will". Where there is no presumptively valid general contract, the ict [sic] Court's duty to compel arbitration pursuant to the Federal Arbitration Act is not triggered. *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (1992). A contract did not exist between Cindy McNaughton and United HealthCare Corporation, and as such the arbitration clause is not a valid and enforceable arbitration agreement under the Federal Arbitration Act.

In *Chastain*, the Eleventh Circuit held that because there was no presumptively valid general contract, the District Court was not required to compel arbitration pursuant to the Federal Arbitration Act. *Chastain* involved a plaintiff who had not actually signed the

contract that was the basis of the arbitration claim. In the present case, Plaintiff signed an acknowledgment *form*, not a contract. The arbitration clause was not part of a valid contract, and standing alone it does not constitute a contract between Plaintiff and Defendant United.

The Arbitration Clause is not Mutually Binding

Under Alabama law, the basic elements of a contract are an offer and acceptance, consideration, and mutual assent to the essential terms of the agreement. *Strength v. Alabama Dept. of Finance, Div. of Risk Management*, 622 So.2d 1283 (Ala. 1993). The arbitration clause in the present case fails for lack of mutuality. Defendant United HealthCare did not agree to arbitrate any and all disputes arising out of the employment agreement. In fact, Defendant United HealthCare did not agree to anything at all.

United's employee handbook has a section entitled "United HealthCare Corporation Employment Arbitration Policy" which states under subpart A, Statement of Intent, as follows:

> While arbitration is an essential element of your employment relationship and is a condition of your employment, nothing in this Policy creates or is intended to create any other specific term or condition relating to employment. **United HealthCare reserves the right to alter, amend, modify, or revoke this Policy at its sole and absolute discretion at any time with or without notice.**

(Emphasis Added) (Attached hereto as Exhibit B) The United HealthCare Employee Handbook is incorporated by reference into the Code of Conduct and Employee

Handbook Acknowledgment form, and the form itself states:

> **I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.**

(Emphasis Added) (Attached hereto as Exhibit C) Defendant United is not bound by the arbitration clause in the employment agreement.

Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir.1985) is a case directly on point. In *Hull* the plaintiff was a former employee who brought an action seeking damages and a claim that his employment contract was invalid because of defendant Norcom's alleged fraud in the inducement to enter into the contract. Norcom filed a motion to compel arbitration based on an arbitration provision in the contract. The arbitration provision reserved defendant Norcom's right to a judicial forum in certain circumstances. The district court found the arbitration clause in the employment contract invalid for lack of consideration, and the Eleventh Circuit upheld that decision. The court based its holding on the fact that Norcom's obligation was illusory. The arbitration clause was not mutually binding under contract law; Norcom had reserved the option to raise and resolve disputes that it may have against another party in a court of law rather than through arbitration. The Eleventh Circuit found that the consideration underlying the agreement between Hull and Norcom was insufficient to support the enforcement of an arbitration provision which was unilaterally binding. The court went on to hold that the consideration exchanged for one party's promise to arbitrate must be

the other parties' promise to arbitrate at least some specified class of claims. Mere presence of an arbitration clause is insufficient to enforce the arbitration agreement. The *Hull* case is strikingly similar to the case at bar, the only difference being that in *Hull* the defendant Norcom agreed to *something*. In the present case defendant United has reserved the right to change any provision of the arbitration agreement in any way it pleases, at any time it pleases, without notice to anyone. United has agreed to absolutely *nothing*. The arbitration clause in the employee handbook is invalid and unenforceable because it is not binding on defendant United HealthCare.

Conclusion

The Alabama Supreme Court has just recently begun to enforce arbitration clauses *in contracts*. In the case of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), the United States Supreme Court held that Alabama's Code Section 8-1-43(3), which prohibited the specific enforcement of an agreement to submit a controversy to arbitration, is preempted by the Federal Arbitration Act. *Allied-Bruce* involved a termite prevention *contract*. The case that defendants cite in support of their motion to stay, *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, infra, involved a contractual agreement between plaintiff and defendant. The Federal Arbitration Act provides for enforcement of arbitration agreements in a maritime transaction, regarding a controversy in existence when the agreement is signed, or *in a contract*. The arbitration agreement in the instant case is none of the above and is

invalid and unenforceable. It is not part of a valid contract, and, standing alone, it is not binding on defendant United HealthCare. Plaintiff should be allowed to pursue her claims against United in the appropriate judicial forum.

/s/ W. Lewis Garrison, Jr.
W. Lewis Garrison, Jr.,
GAR008

/s/ Ashley M. Taylor
Ashley M. Taylor, TAY047

OF COUNSEL:

JACKSON, GARRISON & SUMRALL, P.C.
2117 Magnolia Avenue
Birmingham, Alabama 35205
(205) 326-3336

CERTIFICATE OF SERVICE

Plaintiff certifies that she has served a copy of the above and foregoing by U.S. mail on this the 22nd day of May, 1997, addressed as follows:

Edward S. Allen
Marcel L. DeBruge
Miriam Gibson Harris
Balch & Bingham LLP
1710 6th Avenue North
Birmingham, Alabama 35201

/s/ Ashley M. Taylor
OF COUNSEL

PLAINTIFF'S EXHIBIT A

United HealthCare **Code of Conduct and Employee Handbook Acknowledgement**

I acknowledge that I have received a copy of the United HealthCare (UHC) Code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.

Code of Conduct

It is of the highest importance to UHC to conduct its business and operations in compliance with applicable law and sound business ethics. I understand that it is my obligation to comply with UHC's Code of Conduct, including the obligation to report violations of the law or the Code of Conduct policy. I will carry out my responsibilities for UHC in accordance with the Code of Conduct and applicable law.

Employee Handbook

At-Will Employment

I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion,

change, rescind, or add to any policies, benefits or practices with or without prior notice.

I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline. I understand that only the Chief Executive Officer or the Senior Executive of Human Resources, in a written and signed document, have the authority to make a binding contract or promise relating to employment or to modify "at-will" employment for any employee under any circumstance.

Specific Acknowledgements

I acknowledge that I have specifically received and reviewed the policies referenced below at the time I received this Handbook and agree to abide by these policies.

Sexual and Other Harassment (pages A3-1 through A3-2). Harassment based on age, race, gender, color, religion, national origin, disability, marital status, covered veteran status, sexual orientation, status with respect to public assistance, or any other characteristic protected under state, federal or local law is prohibited in any form at the workplace, at work related functions, anywhere UHC employees are performing their jobs, or which occurs outside of work but effects the workplace. I understand UHC's complaint procedure and prohibition of retaliation and agree to abide by this policy.

Insider Trading (section A4). I acknowledge that in carrying out my assigned responsibilities, I may obtain information that is considered material non-public information. I understand that it is my obligation to protect such information and to comply with UHC's Insider Trading policy.

PLAINTIFF'S EXHIBIT B

UNITED HEALTHCARE CORPORATION EMPLOYMENT ARBITRATION POLICY

A. STATEMENT OF INTENT

United HealthCare Corporation and its subsidiaries (referred to as "United HealthCare") value each of their employees and look forward to good relations with, and among, all employees. Occasionally, however, disagreements may arise between an individual employee and United HealthCare or between employees in a context that involves United HealthCare. United HealthCare believes that the resolution of those types of disagreements are best accomplished by internal dispute review ("IDR") and, where that fails, by arbitration conducted under the rules of the American Arbitration Association. Employees and United HealthCare benefit from the use of private arbitration because it usually results in quicker, less costly resolution of disagreements than litigation in state or federal courts. For these reasons, United HealthCare has adopted this Employment Arbitration Policy (the "Policy").

This Policy does not constitute a promise or agreement that your employment will continue for any specified period of time or end only under certain conditions. Employment at United HealthCare is a voluntary relationship existing for no definite period of time, and nothing in this Policy or any other United HealthCare document creates or is intended to create an express or implied contract of employment. While arbitration is an essential element of your employment relationship and is a condition of your employment, nothing in this Policy

creates or is intended to create any other specific term or condition relating to your employment. United HealthCare reserves the right to alter, amend, modify, or revoke this Policy at its sole and absolute discretion at any time with or without notice. The Senior Executive, Human Resources, has the sole authority to alter, amend, modify or revoke this Policy.

B. SCOPE OF POLICY

Arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. Since many employment disputes can be successfully resolved in the IDR process, an employee cannot use this Policy unless they have first completed the IDR process. If an employment related dispute is not resolved through the IDR process and the matter is based on a legal claim, any party to the dispute may initiate the arbitration process.

A dispute is based on a legal claim and is subject to this Policy if it arises or involves a claim under any federal, state or local statute, regulation or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment, or termination of employment including, but not limited to, the following: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Rehabilitation Act of 1973, the Americans With Disabilities Act, the Employee Retirement Income Security Act of 1974, and all applicable amendments; state human rights or fair

employment practices laws; breach of contract, promissory estoppel, or any other contract theory; and defamation, employment negligence, or any other tort theory. This Policy does not preclude an employee from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission.

The arbitrator will be bound by the applicable law of the jurisdiction under which the dispute arises. This Policy covers any dispute subject to arbitration which is brought on or after the applicable effective

PLAINTIFF'S EXHIBIT C

United HealthCare **Code of Conduct and Employee Handbook Acknowledgement**

I acknowledge that I have received a copy of the United HealthCare (UHC) Code of Conduct and the Employee Handbook. I understand that these documents contain important information on UHC's general personnel policies and on my obligations as an employee. I will remain familiar with, and agree to abide by these policies.

Code of Conduct

It is of the highest importance to UHC to conduct its business and operations in compliance with applicable law and sound business ethics. I understand that it is my obligation to comply with UHC's Code of Conduct, including the obligation to report violations of the law or the Code of Conduct policy. I will carry out my responsibilities for UHC in accordance with the Code of Conduct and applicable law.

Employee Handbook

At-Will Employment

I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment Arbitration Policy, do not establish a contract or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC may periodically, at its discretion,

change, rescind, or add to any policies, benefits or practices with or without prior notice.

I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline. I understand that only the Chief Executive Officer or the Senior Executive of Human Resources, in a written and signed document, have the authority to make a binding contract or promise relating to employment or to modify "at-will" employment for any employee under any circumstance.

Specific Acknowledgements

I acknowledge that I have specifically received and reviewed the policies referenced below at the time I received this Handbook and agree to abide by these policies.

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Insider Trading (section A4). I acknowledge that in carrying out my assigned responsibilities, I may obtain information that is considered material non-public information. I understand that it is my obligation to protect such information and to comply with UHC's Insider Trading policy.

IN THE SUPREME COURT OF ALABAMA

CINDY L. MCNAUGHTON, Plaintiff,	)	CASE NUMBER: _____
vs.	)	
UNITED HEALTHCARE SERVICES, INC., et al., Defendants.	)	

PETITION FOR WRIT OF MANDAMUS

W. LEWIS GARRISON, JR.
ASHLEY M. TAYLOR
JACKSON, GARRISON & SUMRALL, P.C.
2117 Magnolia Avenue
Birmingham, Alabama 35205
(205) 326-3336

July 10, 1997

IN THE SUPREME COURT OF ALABAMA

CINDY L. MCNAUGHTON, Plaintiff,	)	CASE NUMBER: _____
vs.	)	
UNITED HEALTHCARE SERVICES, INC., et al., Defendants.	)	

PETITION FOR WRIT OF MANDAMUS

Cindy L. McNaughton, plaintiff, files this, her petition for a writ of mandamus, and says as follows:

I. STATEMENT OF THE CASE

Plaintiff filed her complaint, request for production, request for admission, and deposition notice in this case, Case Number 97-2058, on April 7, 1997. The basis of plaintiff's complaint was fraud and intentional interference with business relations. It involves an incident whereby plaintiff was promised a transfer of employment with defendant, acted in reliance on defendants' representations of a transfer, and was subsequently told that her transfer position had been filled by a more qualified applicant. A copy of said complaint and discovery is attached hereto as Exhibit A. On April 22, 1997, Defendants filed a motion to stay further proceedings pursuant to the Federal Arbitration Act, attached hereto as Exhibit B. On April 23, 1997, Defendants filed a motion to extend time for filing answer and stay discovery, attached hereto as Exhibit C. In support of these motions defendants alleged that plaintiff had executed a valid arbitration agreement, and that this agreement established mandatory and binding arbitration as the exclusive remedy for all employment related disputes. The motion to extend time for filing answer and stay discovery was heard on May 5, 1997 before Judge Jack D. Carl, Circuit Court of Jefferson County, Alabama. At this hearing, Judge Carl granted defendants' motion until such time as he ruled on their motion to stay further proceedings pursuant to the Federal Arbitration Act. On June 12, 1997, Judge Carl granted defendants' motion to stay all proceedings based on the alleged arbitration agreement. See copy of order, attached hereto as Exhibit D. It is this order that plaintiff seeks to have reviewed by writ of mandamus.

II. STATEMENT OF THE FACTS

In July of 1996, plaintiff was hired by defendant United HealthCare in Montgomery, Alabama, as an Account Service Coordinator. The United employee handbook expressly provided that plaintiff's employment with United was "at-will" Exhibit E. In October of 1996, plaintiff was transferred to the position of Account Service Representative. She received a substantial increase in salary. In February of 1997, plaintiff expressed a desire to transfer to United's Birmingham office. On February 22, 1997, she attended an interview with defendant Tony DeRico, Medicare Complete Supervisor for United's Birmingham office. At the close of the February 22, 1997 interview, DeRico offered plaintiff a position with the Birmingham office and asked her when she could begin work. Plaintiff stated that she had to notify the Montgomery office of her transfer. DeRico said he needed her to start as soon as possible and that he would talk to her supervisor the following Monday in reliance on these representations, plaintiff notified United's Montgomery office that she would be transferring to Birmingham, forfeited her lease deposit in Montgomery, sold her furniture, and moved to Birmingham.

On or about March 5, 1997, in preparation for her new position, plaintiff picked up reading materials from United in Birmingham.

On or about March 17, 1997, with full knowledge that plaintiff now resided in Birmingham and was waiting to begin work with United's Birmingham office, United's Human Resources department contacted plaintiff and

told her that the Birmingham position had been filled by a more qualified applicant.

At no time did any agent or representative of United inform plaintiff that she did not have the Birmingham job. At no time did any agent or representative of United, including defendant Tony DeRico, tell the plaintiff that United was interviewing other applicants for the position. At no time during her conversations with various people at United in Birmingham was plaintiff told that there was even a remote possibility that she would not get the job. Defendants were well aware that plaintiff planned to and eventually did move to Birmingham in reliance on their representations as to her transfer of employment. Defendants went so far as to provide Plaintiff information to prepare her for her new position in Birmingham. Defendants were also aware that Plaintiff did not actually have a job with United in Birmingham, and they failed to inform her of this fact.

Plaintiff's attempts to utilize United's internal dispute resolution process proved futile. United merely agreed to reimburse plaintiff her mileage for commuting from Birmingham to Montgomery and her lost lease deposit.

Plaintiff's position at United in Montgomery has been filled as a result of this incident she has been forced to take another job with a reduced salary and fewer benefits. She has suffered extreme mental and emotional distress.

Defendants claim that this case should be submitted to arbitration. In support of this contention they assert that the plaintiff executed a "contract", and that this

"contract" established mandatory, binding arbitration as the exclusive remedy for all employment related disputes. It is plaintiff's position that the alleged arbitration agreement is invalid and unenforceable.

III. STATEMENT OF THE STANDARD OF REVIEW

A writ of mandamus is an extraordinary remedy and requires a showing that there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. *Ex parte Edgar,* 543 So.2d 682 (Ala. 1989). The last two requirements are met from the outset; a petition for writ of mandamus is the proper means to challenge a trial court's order granting a motion to compel arbitration. *Ex parte Phelps,* 672 So.2d 790 (Ala. 1995). Plaintiff Cindy McNaughton has a clear legal right to have her claims heard by the court. Defendants have refused her this right by asserting the enforceability of an invalid arbitration agreement.

IV. STATEMENT OF THE ISSUE

Whether the circuit court erred in granting the defendants' motion to stay proceedings pursuant to the Federal Arbitration Act?

ARGUMENT

The Arbitration Clause is Not Part of a Contract

The plain language of 9 U.S.C. § 3, the Federal Arbitration Act, provides for enforcement of an arbitration agreement if it is part of any maritime transaction, or part of a contract evidencing a transaction involving commerce. The Supreme Court of the United States has interpreted this to mean that there are three kinds of arbitrable agreements: 1) those involving maritime transactions; 2) those covering the submission of a dispute that exists when the arbitration agreement is executed; and 3) those that concern a written provision *in a contract* involving commerce. *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 645 (1985). (Emphasis added) None of these circumstances are applicable to the case at bar.

9 U.S.C. § 3 provides for enforcement of an agreement to arbitrate if it is a written provision in any maritime transaction or a *contract* evidencing a transaction involving commerce. The employment agreement in the present case, by its own terms, was "at-will". There was no contract between Plaintiff and Defendants. Plaintiff could leave United at any time for any reason, and United could discharge Plaintiff at any time for any reason. Plaintiff could not maintain an action for breach of contract. No contractual relationship existed between Plaintiff and Defendant United. Since there was no contract, it necessarily follows that the arbitration clause is not a written provision *in a contract*, as is mandated by 9 U.S.C. § 2, and therefore is not a valid agreement to arbitrate under the Federal Arbitration Act.

It is well established under Alabama law that generally, an employee is terminable at will. *Howard v. Wolff Broadcasting Corporation*, 611 So.2d 307 (Ala. 1992); *McCluskey v. Unicare Health Facility, Inc.*, 484 So.2d 398 (Ala. 1986); *Kitsos v. Mobile Gas Service Corp.*, 431 So.2d 1150 (Ala.1983). In *White v. Chelsea Industries, Inc.*, 425 So.2d 1090 (Ala.1983), the plaintiff's claim that an employee handbook rose to the level of a contract of employment failed because the court held that the handbook did not vary the general common law rule that an employee is terminable at will. The Alabama Supreme Court has recognized that a plaintiff may not allege breach of contract if she is an employee at will. *Miller v. SCI Systems, Inc.*, 479 So.2d 718 (Ala. 1985). Under Alabama law, Cindy McNaughton was an employee at will of Defendant United. By the terms of United's Employee Handbook, no contract existed between McNaughton and United.

McNaughton received a copy of Defendant United HealthCare's Code of Conduct and Employee Handbook Acknowledgment form when she was originally hired by United. This form, attached hereto as Exhibit A, provides in pertinent part:

> *At-Will Employment*
>
> I understand that the provisions in this Handbook are guidelines and, except for the provisions of the Employment of arbitration Policy, **do not establish a contract** or any particular terms or condition of employment between myself and UHC. None of the policies constitute or are intended to constitute a promise of employment. I further understand that UHC

> may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.
>
> I understand that the employment relationship is "at will" and is based upon the mutual consent of myself and UHC. Accordingly, I agree that UHC or I may terminate the employment relationship at any time and for any reason, with or without notice or prior discipline.

There is no question that the employment arrangement between Plaintiff and Defendants was "at-will". Where there is no presumptively valid general contract, the court's duty to compel arbitration pursuant to the Federal Arbitration Act is not triggered. *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (1992). A contract did not exist between Cindy McNaughton and United Health-Care Corporation, and as such the arbitration clause is not a valid and enforceable arbitration agreement under the Federal Arbitration Act.

In *Chastain*, the Eleventh Circuit held that because there was no presumptively valid general contract, the District Court was not required to compel arbitration pursuant to the Federal Arbitration Act. *Chastain* involved a plaintiff who had not actually signed the contract that was the basis of the arbitration claim. In the present case, Plaintiff signed an acknowledgment *form*, not a contract. The arbitration clause was not part of a valid contract, and standing alone it does not constitute a contract between Plaintiff and Defendant United.

Defendants cite the New York case of *Mave v. Smith Barney*, 897 F.Supp. 100 (S.D. N.Y. 1995) in support of their claim that the arbitration clause is part of a contract.

That case held that the *arbitration agreement* was a valid contract, and is distinguishable because the language in the policy there stated "you and *we* agree to . . . submit the dispute . . . to binding arbitration." Here, United HealthCare did not agree to anything. The allegedly binding language in the policy and the handbook refers only to the employee's obligation to arbitrate. In the present case the arbitration agreement is not part of a contract, as is mandated by the Federal Arbitration Act, and Defendant United HealthCare did not mutually agree to submit all disputes to arbitration.

Defendants next allege that the arbitration agreement itself is a valid and enforceable contract. The arbitration clause is **not** a valid contract, it fails for lack of mutuality.

The Arbitration Clause is not Mutually Binding

Under Alabama law, the basic elements of a contract are an offer and acceptance, consideration, and mutual assent to the essential terms of the agreement. *Strength v. Alabama Dept. of Finance, Div. of Rish Management*, 622 So.2d 1283 (Ala.1993). The arbitration clause in the present case fails for lack of mutuality. Defendant United HealthCare did not agree to arbitrate any and all disputes arising out of the employment agreement. In fact, Defendant United HealthCare did not agree to anything at all.

United's employee handbook has a section entitled "United HealthCare Corporation Employment Arbitration Policy" which states under subpart B, Scope of Policy, as follows:

> The Policy does not require that United HealthCare initiate the arbitration process in regard to

> any dispute. In addition, **United HealthCare is not required to follow the steps of either IDR or the Policy before initiating or implementing any disciplinary action, or before asserting any claim, demand or action against an employee for breach of any restrictive covenant, wrongful disclosure of confidential information, or any other actions which may constitute a breach of contract, a breach of United HealthCare's Code of Conduct, a breach of a common law duty, or a breach or violation of either civil or criminal law.**

(Emphasis Added) (Attached hereto as Exhibit B) The United HealthCare Employee Handbook is incorporated by reference into the Code of Conduct and Employee Handbook Acknowledgment form, and the form itself states:

> **I further understand that UHC may periodically, at its discretion, change, rescind, or add to any policies, benefits or practices with or without prior notice.**

(Emphasis Added) (Attached hereto as Exhibit C) Defendant United is attempting to bind its employees to arbitration while reserving to itself the right to pursue *any form of relief it so chooses*. This behavior epitomizes unconscionability, and is precisely what our judicial system was designed to protect against.

The Alabama Supreme Court recently held that in a case involving a contract of adhesion, if it is not shown that the party in an inferior bargaining position had a meaningful choice of agreeing to arbitrate or not, and if the superior party has reserved to itself the choice of arbitration or litigation a court may deny the superior

party's motion to compel arbitration based on the doctrines of mutuality of remedy and unconscionability. *Northcom, Ltd. V. R.E. James*, 1997 WL 233918 (Ala. May. 9, 1997). There is authority in Alabama for the proposition that a contract lacking in mutuality is unenforceable. *Marcum v. Embry*, 282 So.2d 49 (Ala. 1973); *Hill v. Rice*, 67 So.2d 789 (Ala. 1953); *Hunt v. Hammonds*, 60 So.2d 355 (Ala. 1952); *Sherrill v. Alabama Appliance Co.*, 197 So. 1 (Ala. 1940). It is undoubtedly the law that a unilateral contract, that is, on which is binding on one party and not the other, will not authorize an action for breach of same by the party not bound against the one that is, *Perfection Mattress & Spring Co. V. Dupree*, 113 So. 74 (Ala. 1927). The Alabama legislature has expressed a strong policy against specific enforcement of arbitration contracts and has also adopted a strong version of the doctrine of mutuality of remedy. Alabama Code of 1975 § 8-1-43 provides as follows:

> Neither party to an obligation can be compelled specifically to perform it unless the other party thereto has performed or is compelled specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, with full compensation for any want of entire performance.

In *Northcom* the defendant sought to arbitrate a dispute under an agreement in a contract that reserved defendants' right to obtain injunctive relief. The court found no indication that the contract was one of adhesion based on the fact that both the plaintiffs and defendants were represented by counsel and had the opportunity to negotiate the contract. In the present case the arbitration

agreement, if it were considered to be a contract, is a contract of adhesion. United HealthCare has reserved the right to change the policy in its sole discretion, in any way, at any time, without notice to anyone. United HealthCare has reserved the right to pursue claims in a judicial forum if it so desires, while at the same time attempting to bind its employees to arbitration.

Adhesion contracts refer to a standard contract form offered to consumers of goods and services essentially on a take it or leave it basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing to the form of the contract. *Northcom, Ltd. V. R.E. James,* 1997 WL 233918 (Ala. May 9, 1997). Defendants have admitted that plaintiff accepted employment with UHC subject to the condition that she would arbitrate all employment related disputes. (Defendants' reply to plaintiff's response in opposition to defendants' motion to stay further proceedings, p. 5-6). Plaintiff was not provided an opportunity to negotiate; the signing of the arbitration agreement was necessary to her employment. Defendants are obviously in a superior bargaining position and have given themselves the choice of doing whatever they please, while at the same time attempting to bind plaintiff with the arbitration policy. The arbitration policy in the present case is a contract of adhesion and as such as unilateral, unconscionable and unenforceable.

Hull v. Norcom, Inc., 750 F.2d 1547 (11th Cir. 1985) is a case directly on point. In *Hull* the plaintiff was a former employee who brought an action seeking damages and a claim that his employment contract was invalid because

of defendant Norcom's alleged fraud in the inducement to enter into the contract. Norcom filed a motion to compel arbitration based on an arbitration provision in the contract. The arbitration provision reserved defendant Norcom's right to a judicial forum in certain circumstances. The district court found the arbitration clause in the employment contract invalid for lack of consideration, and the Eleventh Circuit upheld that decision. The court based its holding on the fact that Norcom's obligation was illusory. The arbitration clause was not mutually binding under contract law; Norcom had reserved the option to raise and resolve disputes that it may have against another party in a court of law rather than through arbitration. The Eleventh Circuit found that the consideration underlying the agreement between Hull and Norcom was insufficient to support the enforcement of an arbitration provision which was unilaterally binding. The court went on to hold that the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims. Mere presence of an arbitration clause is insufficient to enforce the arbitration agreement. The *Hull* case is strikingly similar to the case at bar, the only difference being that in *Hull* the defendant Norcom agreed to *something*. In the present case defendant United has reserved the right to change any provision of the arbitration agreement in any way it pleases, at any time it pleases, without notice to anyone. United has reserved the right to bring suit against its employees in a court of law. United has agreed to absolutely **nothing**. The arbitration clause in the employee handbook is invalid and

unenforceable because it is not binding on defendant United HealthCare.

The Alabama Supreme Court has just recently begun to enforce arbitration clauses *in contracts*. In the case of *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), the United States Supreme Court held that Alabama's Code Section 8-1-43(3), which prohibited the specific enforcement of an agreement to submit a controversy to arbitration, is preempted by the Federal Arbitration Act. *Allied-Bruce* involved a termite prevention *contract*. The case that defendants cite in support of their motion to stay, *Mitsubishi Motors Corp. V. Soler Chrysler-Plymouth, Inc.*, infra, involved a contractual agreement between plaintiff and defendant. The Federal Arbitration Act provides for enforcement of arbitration agreements in a maritime transaction, regarding a controversy in existence when the agreement is signed, or *in a contract*. The arbitration agreement in the instant case is none of the above and is invalid and unenforceable. It is not part of a valid contract, and, standing alone, it is not binding on defendant United HealthCare. Plaintiff should be allowed to pursue her claims against United in the appropriate judicial forum. Under Alabama law, defendants' motion to compel arbitration is due to be denied.

V. CONCLUSION

For all of the foregoing reasons, a writ of mandamus should issue directing the circuit court to reconsider its earlier order granting defendants' motion to stay proceedings based on the Federal Arbitration Act, on the

ground that the alleged arbitration agreement is invalid and unenforceable.

PLAINTIFF RESPECTFULLY REQUESTS ORAL ARGUMENT ON THE ABOVE PETITION FOR WRIT OF MANDAMUS.

/s/ W. Lewis Garrison, Jr.
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/s/ Ashley M. Taylor
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CERTIFICATE OF SERVICE

Plaintiff certifies that she has served a copy of the above and foregoing by hand delivery on this the 10th day of July, 1997, addressed as follows:

Edward S. Allen
Marcel L. DeBruge
Miriam Gibson Harris
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/s/ Ashley M. Taylor
OF COUNSEL

[PETITIONER'S VOLUMINOUS EXHIBITS ARE OMITTED]